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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

NATIONAL LABOR RELATIONS BOARD,
PETITIONER
V.
HENDRICKS COUNTY RURAL ELECTRIC
MEMBERSHIP CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE, LEGAL FOUNDATION OF AMERICA, URGING AFFIRMANCE

DAVID CRUMP
PROFESSOR OF LAW
LAW SCHOOL
UNIVERSITY OF HOUSTON
HOUSTON, TEXAS 77004
(713) 749-3878
ATTORNEY OF RECORD FOR AMICUS CURIAE

OF COUNSEL:

MARK S. PULLIAM
SUSAN E. WAITE
LEGAL FOUNDATION OF AMERICA

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NATIONAL LABOR RELATIONS BOARD,

Petitioner

V.

HENDRICKS COUNTY RURAL ELECTRIC MEMBERSHIP CORPORATION,

Respondent

On writ of certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF AMICUS CURIAE, LEGAL FOUNDATION OF AMERICA

CONSENT OF PARTIES

All parties have consented to the filing of this brief of amicus curiae. Letters of consent have been lodged with the Court.

INTEREST OF AMICUS CURIAE

Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm.

Its goals (among others) include limited government, protection of the free enterprise system, and the removal of unreasonable regulation. All litigation undertaken by LFA is approved by its Board of Trustees. LFA does not accept private fees, and the bulk of its work is done by professors of law.

In this case, LFA would urge this Supreme Court to affirm the judgment of the Court of Appeals, holding that personal secretaries of managers are "confidential employees" excluded from the coverage of the National Labor Relations Act. To hold otherwise could conceivably mean that confidential personal secretaries could collectively bargain with their managers concerning the details of this most intimate of working relationships. Even if the consequences were confined to "mutual aid and protection," a contrary holding would mean that one could not trust one's personal secretary with any sort of private

information for fear that it might be used with impunity in protected concerted activities.

STATEMENT OF THE CASE

Mary Weatherman was the personal secretary of the general manager of Hendricks County Rural Electric Membership Corporation, Wallace Dillon. Dillon discharged her a few days after she signed a petition supporting an employee who had been denied reinstatement by the Board of Directors of the Corporation. Although the reason for the discharge was a matter of dispute at trial, the administrative law judge concluded that it was motivated by Weatherman's signing of the petition. This fact finding, in turn, led to a holding by the NLRB that the Corporation was guilty of an unfair labor practice, in that it had discharged Weatherman for engaging in concerted mutual-aid-and-protection activity. The NLRB concluded that Weatherman was not a "confiden-

tial employee" excluded from coverage of the National Labor Relations Act, because although she was a personal secretary and entrusted with confidential information, she did not deal with confidential labor relations matters.

The Court of Appeals denied enforcement of the Board's order. It held, contrary to the Board, that confidential employees were excluded from the coverage of the Act irrespective of the presence or absence of any "labor nexus." Thus even if Dillon did perceive Weatherman's conduct as an act of disloyalty and discharge her for it, the discharge was not unlawful because, under the Court of Appeals holding, he was entitled to do so. This Court granted certiorari to consider this question.

In a companion case, NLRB v. Malleable Iron Range Company, the employer claimed that 18 of approximately 64 employees were "confidential." The employees ranged from

a "production process coordinator," who managed much of the company's production, to a person the NLRB claims is "essentially a shipping clerk." The NLRB, however, did not distinguish those closely allied with management; rather, it indiscriminately decided that since none of the employees were entrusted with confidential labor information all were covered. The Court of Appeals reversed. Without deciding whether any of such employees were covered, the Court directed the NLRB to reconsider each on a case-by-case basis. Thus Malleable did not result in exclusion of anyone from the Act, but simply required the Board to reconsider each of the employees under the test enunciated in Hendricks.

SUMMARY OF THE ARGUMENT

I.

The decision of the Board was based upon the Board's own B.F. Goodrich standard,

which requires a "labor nexus" for an employee to be excluded as "confidential." The Court of Appeals, however, correctly concluded that this Court's decision in NLRB v. Bell Aerospace Corp. overruled that standard.

II.

The legislative history and the policy underlying the exception indicate that confidential employees should be excluded from the coverage of the Act without respect to labor nexus.

III.

A. The exclusion of confidential employees without regard to labor nexus is consistent with the need for some degree of business associational privacy, a requirement to be found in constitutional doctrine as well as legislative policy.

B. A personal secretary presents particularly strong business privacy reasons for exception from the coverage of the

act, in that (1) there is greater need than with the rank-and-file for personalized control over the secretary's manner of execution of the job; (2) the secretary's handling of confidential information should not be the subject of labor negotiations; (3) there is need for informal and frank communication with one's secretary without fear that such communication will be used in "mutual aid" activities; and (4) the close working relationship between secretary and manager requires an ability to terminate the relationship for personal reasons, without fear of concerted reprisal or grievances.

ARGUMENT AND AUTHORITIES

I. IN NLRB V. BELL AEROSPACE CO., THIS COURT OVERRULED THE BOARD'S B.F. GOODRICH STANDARD AND INDICATED THAT NO "LABOR NEXUS" WAS REQUIRED TO EXCLUDE "CONFIDENTIAL EMPLOYEES" FROM PROTECTION FOR LABOR ACTIVITIES.

In NLRB v. Bell Aerospace Co., 416 U.S. 267, 270-75 (1974), this Court rejected the Board's "labor nexus" definition of the "managerial employee" exception to the NLRA. Bell Aerospace was a clear overruling of the standard the Board set in B.F. Goodrich Co., 115 N.L.R.B. 722 (1956), in which the NLRB had restricted such exceptions to employees working with labor relations. Focusing on the historical and economic distinctions between "management" and "labor" and the relevant legislative materials accompanying the 1947 Taft-Hartley amendments, this Court held that "'managerial employees' are not covered by the Act. We agree with the Court of Appeals below that the Board 'is not now free' to read a a new and more restrictive meaning into the Act" by the adoption of tests such as "labor nexus." 416 U.S. at 289.

The "confidential employee" exception was not directly at issue in Bell Aerospace. However, the Court thoroughly canvassed the Congressional reports and made a number of pointed references to the parallels between managerial personnel and "confidential employees." It noted, for instance, that

> both the House Report and the Senate Report voiced concern over the Board's broad [pre-1947] reading of the term "employee" to include those clearly within the managerial hierarchy.

416 U.S. at 281; see also Packard Motor Car Co. v. NLRB, 330 U.S. 485, 494-95 (1947) (Douglas, J., dissenting) (basic policy of the NLRA is to create an adversarial struggle between the distinctly separate "camps" or "factions" of management and labor; "what is included in one group is excluded from the other").

The House Report relied upon in Bell Aerospace stated that "confidential employees"

> are people who receive from their employers information that not only is confidential but also that is not available to the public, or to competitors, or to employees generally.

H.R. Rep. No. 245, 80th Cong., 1st Sess., 23 (1947). This passage obviously does not contemplate that only labor-related confidential information would qualify. It squarely contradicts such a "labor nexus." In Bell Aerospace, the Court was concerned directly with the exception for "managerial" employees, but it also spoke about "confidential" employees. It unquestionably interpreted the legislative history of the Taft-Hartley amendments as having excepted confidential clerks and secretaries, as well as managers, without regard to "labor nexus":

> The discussion of "confidential employees" in both the House and Conference Committee Reports... unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus,

> although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.

416 U.S. at 284 n. 12 (emphasis added). The Court treated "managerial" and "confidential" employees similarly throughout its opinion, insofar as rejection of a "labor nexus" requirement was concerned.

Despite the obvious import of this Court's careful reasoning and analysis, the NLRB has failed to follow the Bell Aerospace mandate, with the apparent acquiescence of several courts of appeals. It is imperative, in order to preserve the doctrinal integrity of Bell Aerospace and to implement the "clear" and "unmistakable" intent of Congress, that the B.F. Goodrich

standard be once again declared invalid.* Decisions contrary to that of the Court of Appeals in the case at bar, such as Union Oil Co. of California, Inc. v. NLRB, 607 F.2d 852 (9th Cir. 1979) and NLRB v. Allied Products Co., 548 F.2d 644 (6th Cir. 1977), are inconsistent with Bell Aerospace and should therefore be overruled. The decisions in NLRB v. Wheeling Electric Co., 444 F.2d 783, 78488 (4th Cir. 1971) and Peerless of America, Inc. v. NLRB, 484 F.2d 1108, 1112 (7th Cir. 1973), holding

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*In Flinkote Co., 217 N.L.R.B. 497, (1975), the Board rejected a contention that Bell Aerospace had expanded the Board's traditional test of confidential status. "The Court's comments were dicta, since the confidentiality issue was not before it." Id. Thus, the Board adheres to its traditional definition of confidential employees and excludes as confidential only those individuals who assist and act in a confidential capacity to persons who formulate, determine, and, effectuate management policies with respect to labor relations. See Ford Motor Co., 66 N.L.R.B. 1317 (1946); Pullman Standard Division, 214 N.L.R.B. 762 (1974).

that confidential secretaries to management officials are excluded from the coverage of the NLRA, represent the better reasoned view and the only position consisent with this Court's construction of the 1947 amendments in Bell Aerospace.

II. THE POLICY FRAMEWORK OF THE NATIONAL LABOR RELATIONS ACT SUPPORTS THE SEVENTH CIRCUIT'S INTERPRETATION OF THE "CONFIDENTIAL EMPLOYEE" EXCEPTION AS NOT HAVING A "LABOR NEXUS" REQUIREMENT.

Mr. Justice Douglas' dissenting opinion in Packard Motor Car Co. v. NLRB, supra, has been described by this Court as "especially pertinent" in view of the subsequent legislative reversal of Packard. That dissent set forth with succinct clarity the fundamental purpose of the NLRA: to mobilize and regulate the economic struggle between the rank and file workers (known generally as "labor") and the salaried representatives of management. 330 U.S. at 494-95. Congress, in the 1947

Taft-Hartley amendments, clearly sought to effectuate Mr. Justice Douglas' dissenting arguments by excluding from the NLRA's coverage persons who were within the management hierarchy or closely allied with it.

A confidential secretary to a manager or supervisor, because of the employer's critical need for loyalty,* is surely "allied with" members of the management hierarchy, an individual whose sympathies and allegiances are owed to "the boss." Cf. NLRB v. Bell Aerospace Co. 416 U.S. at 282. A confidential employee's commitment to and alignment with management goals does not turn on the content of the information with which he or she is entrusted. Section 2(12)(c) of the bill, H.R. 3020, 80th Cong., 1st Sess. (1947) provided for the exclusion from the Act of

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*See NLRB v. Bell Aerospace Co., 416 U.S. at 281.

> any individual... who by the nature of his duties is given by the employer information that is of an confidential nature, and this is not available to the public, to competitors, or to employees generally, for use in the interest of the employer.

The distinction drawn by the Board in B.F. Goodrich between confidential employees with a "labor nexus" and confidential employees with no such nexus, blurs the proper distinction, which is between management and labor interests. Cf. NLRB v. Bell Aerospace Co., 416 U.S. at 281. Mr. Justice Powell made this exact point to counter the dissenting opinion in Bell Aerospace:

> Extension of the Act to cover true "management employees" [as Congress believed confidential employees were] would indeed be revolutionary, for it would eviscerate the traditional distinction between labor and management.

Id. at 285 n. 13. See Retail Clerks International Ass'n v. NLRB, 366 F.2d 642, 645

(D.C. Cir. 1966), cert. denied, 386 U.S. 1017 (1967)("Congress intended to exclude from the protection of the Act those who comprised a part of 'management' or were allied with it. . .") (emphasis added); NLRB v. Wheeling Electric Co., 444 F.2d 783, 786 (4th Cir. 1971).

Furthermore, the same policy considerations that exclude supervisors, domestic workers, and family members from NLRA coverage, see 29 U.S.C. §152(3), and led Congress to prescribe separate bargaining units for regular employees and security guards who "enforce against employees and other persons rules to protect property of the employer," see U.S.C. §159(b)(3), support exclusion of all "confidential" employees from NLRA coverage. These groups are separated from the rank-and-file of labor because of the great potential for divided loyalties that might otherwise destroy management's "core of

entrepreneurial control," cf. International Union, UAW v. NLRB, 470 F.2d 422, 425 (D.C. Cir. 1972)(per Mr. Justice Clark, retired). Judge Craven, discussing the relationship of a confidential secretary to a management official, has perhaps articulated the policy implications most cogently:

> It strikes us as nonsense for the Board to exclude [a confidential employee] from membership in the bargaining unit and then extend to her the same protection for the same concerted activity that she would have enjoyed if a union member. If [a confidential employee] is committed to the union cause to the extent she joins the strike by refusing to cross the picket line, it would seem to matter little to the company that she is not technically a union member. A confidential secretary who plights her troth with the union differs in form, but not in substance, from one who holds a union card . . . . Management is entitled to security of its confidential information and may insist upon the loyalty of those employees who have access to it. For this reason, confidential employees cannot be granted the protection afforded ordinary

> employees under the Act. Like supervisors, "such loyalty cannot be secured if [they] are psychologically allied with, or subject to the pressures of their union on behalf of, the rank and file."

NLRB v. Wheeling Electric Co., 444 F.2d 783, 788 (4th Cir. 1971), quoting Cox, The Labor-Management Relations Act, 61 Harv. L. Rev. 1,5 (1947). Wheeling Electric is virtually indistinguishable from the instant case and is, amicus for respondent submits, the correct resolution of the issue.

The argument of the NLRB against the general exclusion of confidential employees is, essentially, that all workers are "confidential" to some degree. Thus the NLRB argues that most white-collar workers have some access to credit, cost, design, customer, price or medical information; that teachers are required to keep examinations confidential; that newspaper reporters are required to keep "scoops" confidential; and

that even assembly line workers must know about manufacturing processes. From this, the NLRB concludes that the Court of Appeals' interpretation of the "confidential employee" exception would have a "staggering" and "drastic" effect on coverage of the Act. NLRB brief at 38-39.

The argument is sheer nonsense. It proceeds from the NLRB's unwillingness to concede that reasonable limits can be placed upon the confidentiality exception. Any principle, in the hands of an advocate hostile to it, can be reduced to absurdity by extension in this manner. So it is, for example, with the NLRB's own proposed test, that of labor nexus. In this area, the NLRB has been entirely willing to place reasonable limits on its test; it has required a "substantial" labor nexus. If it did not do so, the same "drastic" effect would result from the NLRB's own reasoning, because, to paraphrase the

NLRB's argument, "most employees have an arguably [labor-nexus] relationship with management" to some degree. NLRB brief at 39. The NLRB is willing, in other words, to test "labor nexus" by its substantiality, but it is not willing to test whether an employee is "confidential" by considering whether the proper handling of confidential managerial information is a "substantial" part of the employee's job.

If sensibly interpreted, the exclusion would thus not make an assembly line worker "confidential" merely because he is exposed to the manufacturing process, because no one would regard the keeping of confidences entrusted him by management as a "substantial" part of his job. Nor would a teacher become confidential merely because he has access to examination questions. But when someone, such as a secretary to a manager, is entrusted with the confidences of management

and the daily performance of her job depends in substantial measure upon keeping of those confidences, she becomes allied with "management" within the meaning of the Act and should be regarded as "confidential," whether the information is labor-related or not. The line thus drawn is no more difficult to administer than that proposed by the NLRB. Furthermore, this approach, unlike the NLRB's, is consistent with Bell Aerospace and with the intent of Congress.

III. THE NEED FOR RECOGNITION OF ASSOCIATIONAL PRIVACY IN THE BUSINESS CONTEXT SUPPORTS AFFIRMANCE.

A. The constitutional doctrine of associational privacy, as well as the legislative history of the Act, support the recognition of a doctrine of associational privacy in the business context.

Finally, amicus for respondent contends that the decisions of the Seventh Circuit must be affirmed in order to preserve a vital sphere of "business privacy" for

management officials. Executives and managers are dependent upon the support services of various clerical, secretarial, and administrative assistants. Were the broad protections of both "organized" and "unorganized" concerted activities* extended to this group of confidential employees, whose intimate knowledge of management data is a necessary prerequisite to their function of implementing management decisions, businessmen would be unable to rely on the loyalty of functionaries who are absolutely crucial to the operation of modern commercial enterprises.

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*Unorganized employees possess broad rights of "mutual aid or protection" under the Act. See, e.g., Note, Individual Rights for Organized and Unorganized Employees Under the National Labor Relations Act, 58 Texas L. Rev. 991 (1980). Needless to say, the application of this doctrine would pose as great an intrusion into the sphere of management autonomy and perogative as would, say, permitting managerial employees to collectively bargain.

Managers, supervisors, and other persons in the management hierarchy must be able to discipline or dismiss employees whose position is "confidential" in the broad meaning of that term, when and if it becomes obvious that the employee's sympathies, allegiance, and loyalty are with "labor" rather than "management." To hold otherwise would "chill" management discretion and entrepreneurial judgment currently protected from NLRB and judicial scrutiny. It seems almost axiomatic that if confidential employees were permitted to engage in "protected concerted activities" and "mutual aid and protection," they would no longer be meaningful confidants. Additionally, it would be incongruous to strip management of its sphere of business privacy and entrepreneurial autonomy and deny it the right to control and discipline persons it employs in a confidential association when the concept of individual

privacy and autonomy is recognized in so many other contexts.

The penumbra of the Bill of Rights recognized in Griswold v. Connecticut, 381 U.S. 479 (1965) should protect management's right to confidential association, for extension of the NLRA to confidential employees would surely be a government intrusion into private relationships. Similarly, it is difficult to distinguish parents' privacy interest in sending their children to parochial school, Pierce v. Society of Sisters, 268 U.S. 510 (1925), and private schools' freedom from excessive regulations, Meyer v. Nebraska, 262 U.S. 390 (1923), from an employer's right to control and limit access to confidential business data.

Even more compelling is the analogy to cases such as NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958), wherein this Court stated:

> [I]t is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.

Id. at 460-61 (emphasis added). In Buckley v. Valeo, 424 U.S. 1 (1976), this Court noted that "[t]he right of association is a 'basic Constitutional freedom' that . . . like free speech, lies at the foundation heart of a free society." Id. at 25.

B. The business privacy interest as to a confidential personal secretary is substantial, and it exists irrespective of the presence or absence of a "labor nexus."

A personal secretary is different from the rank and file of labor for reasons wholly apart from the NLRB's "labor nexus" theory of confidentiality. The reasons relate to associational and business privacy. They include the greater need to control the manner of performance of the

job, the need for frank yet private conversation, the inappropriateness of bargaining about the terms and conditions of guarding confidential information whether labor-related or not, and the intimacy of the working relationship.

(1) The need to control the manner of performance free of bargaining over terms and conditions.

With a confidential personal secretary, a manager has a deeper interest in exercising personal preferences as to control of the exact manner of performance of the job than in most types of employment. Personal and individual tastes may not be important in the context of a secretarial pool used indiscriminately by all persons in an office or in the ordinary labor rank and file, but individual managers have widely differing methods of using personal secretaries. If a particular manager's method of keeping his telephone file,

writing corrections on drafts, or performing the countless other office functions that make up the personal secretary-manager relationship were subject to negotiation by representatives of a personal-secretary bargaining unit under the NLRA, or were even the subject of "mutual aid and protection" between informally allied personal secretaries pitted against their bosses, the result would be an intolerable loss of both efficiency and personal freedom.

(2) The inappropriateness of negotiation concerning the obligation of secrecy, whether labor-related or not.

Secondly, the exposure of the secretary to confidential information creates non-negotiable obligations on the part of the secretary and a corresponding need for greater freedom of control on the part of the manager. To use an extreme example, the right to discipline a CIA agent, freely and immediately, is more important than the

right similarly to discipline a government janitor. The reason does not depend upon "labor nexus." It simply reflects the fact that negotiation over office procedures for handling confidential information is not appropriate.

(3) Frank, personal communication without fear of its use in concerted activities.

Thirdly, there is a need for a privacy in personal communications between secretary and manager, arising from the frank and informal nature of communications between them. A manager should be able to use an earthy expression in the privacy of his office, comment adversely (but privately) upon a co-manager higher in the hierarchy, or even offhandedly and humorously disparage the company's product, without fear that his unguarded remarks may be read the next day in the company newspaper as a result of the exercise of "mutual aid and protection" by his confi-

dential secretary. Such a concern sharply distinguishes the personal secretary from the rank and file, whether the secretary has any "labor nexus" or not.

(4) The need for prerogative in choice of a personal secretary owing to the intimacy of the relationship.

Finally, the close personal working relationship of confidential secretary and manager requires an ability to remove and replace the secretary for reasons of pure personality conflict, even if such treatment would not be countenanced as to employees protected under the NLRA. A secretary and manager often see each other for more hours per day than husband and wife. The lack of prospects for the business equivalent of divorce in such a situation would make for business relations worse than a bad marriage. Bargaining by organized employees, or mutual aid and protection by loosely associated ones,

would make the manager fear a grievance or disruption in such a situation even if he could theoretically justify his actions under a bargaining agreement.

* * *

In the context of the instant case, the NLRB argues that Weatherman did not receive labor relations materials, because Dillon himself had little to do with labor relations and because such communications as Dillon received relating to labor relations were structured to bypass Weatherman. If the decision of the Court of Appeals is reversed, every manager will have to bypass his secretary not only with labor materials, but with materials of a confidential nature of whatever description. A rule allowing managers the ability to trust their personal secretaries would be far preferable. Furthermore, the NLRB's

argument does not answer the confidentiality concerns here expressed as to issues other than labor-related.

In the Malleable case, these policy concerns would apply in varying degrees to the employees in question. For example, the assistant to the manager of the distribution-product-service department who has responsibility for handling product difficulties, who deals on a daily basis with confidential credit, design, pricing, customer and product-defect data, and who in all probability must have a close personal relationship with the manager, would seem to present issues similar to those of a personal secretary. Others may not. In any event, the holding of the Court of Appeals, that the NLRB should make a determination for each employee based on a full factual record, in Malleable, is correct.

CONCLUSION

For all of the reasons adduced in this amicus curiae brief, the decisions of the Seventh Circuit in Hendricks I and Hendricks II should be affirmed.

Respectfully submitted,

David Crump
Professor of Law
Law School
University of Houston
Houston, Texas 77004
(713) 749-3878
Attorney for
Amicus Curiae

CERTIFICATE OF SERVICE

I, David Crump, certify that I have placed in the United States mail, first-class postage prepaid, copies of the above brief, addressed to:

Mr. Warren Krebs
Parr, Richey, Obremsky & Morton
Box 666
Lebanon, Indiana 46052

Wade H. McCree
Solicitor General of the United States
United States Department of Justice
Washington, D.C.

_____, 1981 _____